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No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, et al.,
Petitioners,

v.

WILLIAM McKINNEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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II.

ARGUMENT

It has long been recognized that the details of managing correctional facilities should be left to prison administrators, in deference to the unique problems and limitations which daily confront prison personnel. Although inmate civil rights litigation is important in identifying and maintaining the constitutional rights of inmates not inconsistent with the safe and secure operation of our nation's prisons, the courts are flooded with petitions from prisoners claiming cruel and unusual punishment has been inflicted upon them for reasons which are a far cry from what the Eighth Amendment was intended to encompass.

In this case, McKinney is essentially asking the federal courts to become involved in substituting its judgment on how best to house and classify dangerous and manipulative inmates for that of pri-

son administrators. Claiming to be a non-smoker, he wants this court to decide that he is entitled to his standards of comfort at all times he is in prison. Although he suffers from no serious medical need requiring a non-smoking environment, and although he failed to present in his case-in-chief at trial any evidence his health was at risk by exposure to secondary tobacco smoke, and although he presented no evidence of deliberate indifference on the part of prison officials, he nonetheless asks the Court to declare that he has a right to a relatively smoke-free prison environment.

Petitioners ask this Court to find that the Eighth Amendment prohibition against cruel and unusual punishment does not include regulation by the judiciary of the levels of secondary tobacco smoke in prison, and that in the absence of balancing the many risks in the specific

health problems, housing and classification of inmates are decisions best left to prison officials.

RESPONSE TO STATEMENT OF THE CASE

Petitioners shall comment on Respondent's Statement of the Case.

At the time of trial, smoking generally was permitted in all parts of the prisons within the State of Nevada except for the infirmary and the culinary. Since then, some changes have occurred. Smoking is not permitted in the law libraries, and the wardens of each facility have established some smoking and non-smoking areas consistent with security considerations and the limitations of existing facilities. Inmate requests to be housed with non-smokers are accommodated where feasible and consistent with security and other concerns. Nonetheless, smokers and non-smokers are housed with each other for varying periods of

time, and there are common areas where non-smokers are exposed to secondary tobacco smoke.

Petitioners point out that the U.S. Magistrate before whom the trial was conducted addressed the issues as presented to her by the parties in their joint pretrial order. (See Petition at p. 6)

Respondent relies upon a statement made by the Ninth Circuit Court of Appeals that the U.S. Magistrate excluded any evidence proffered by Petitioner McKinney regarding the potential health effects of ETS exposure. (Pet. App. C-4). However, Petitioners respectfully disagree with the accuracy of this statement, and can find no evidence in the record to support it. The U.S. Magistrate, in a pretrial ruling, denied McKinney's request that the Court appoint an expert for him. He was not precluded from presenting admissible evidence at

trial in support of his claims; rather, he simply failed to do so. The U.S. Magistrate stated, in the Order Entering Judgment in Favor of Defendants:

> McKinney completely failed to adduce any expert testimony or provide any medical evidence which would prove the Defendants' acts were the proximate cause of his injuries. Nor was there any medical proof or testimony that such exposure to cigarette smoke could even cause such symptoms. [Emphasis added]
> (Pet. App. D-9, D-10)

Respondent refers to the sources relied upon by the Ninth Circuit to support its findings that exposure to secondary tobacco smoke is a health risk and that some states and counties either had or were contemplating some type of smoking ban in correctional facilities. The Ninth Circuit's conclusions, however, were made without having given either party the opportunity to brief the issue on appeal. The only authorities cited were those supporting the Ninth Circuits'

conclusion that exposure to secondary tobacco smoke is a health risk. There were no references to studies which concluded the health risk is minimal or dependent on other factors. There was no reference made to the fact that many legislative restrictions on smoking in public areas exclude correctional facilities. (See Pet. App. C-14 to C-19)

Respondent points out the Ninth Circuit originally remanded the case to the district court for further factfinding, based upon the lack of evidence on whether the conditions of McKinney's confinement presented an unreasonable risk to his health. (Pet. App. C-47, N.29). Again, McKinney had his opportunity at trial to offer such evidence, and failed to do so. (Pet. App. D-9, D-10). He is not entitled to a second chance.

Respondent paraphrases the statement of the Ninth Circuit on remand that:

> "...by establishing a subjective component to McKinney's Eighth Amendment claim, Wilson 'simply adds another element to [that] claim which McKinney must prove' (Pet. App. A-6), stating that Wilson did 'not vitiate our determination of what satisfies the objective component' of his claim..."

(See Opposition at p. 5).

The U.S. Supreme Court did not "add" an element; rather, the Court clarified what standard a plaintiff must meet to satisfy the existing subjective component of an Eighth Amendment claim involving prison conditions. The subjective component was not newly established in Wilson v. Seiter, 111 S.Ct. 2321 (1991) in fact, the Court took pains to point out that Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078 (1986), made it clear it has always been necessary to "...inquir[e] into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment."

. . .

Wilson, at p. 2324, citing Whitley v. Albers.

Respondent's statement that "The district court received no evidence on this point [whether McKinney stated an Eighth Amendment claim on the issue of secondary tobacco smoke] or on the subjective portion of any such claim, as Wilson requires" is misleading. (See Opposition at p. 6)

Evidence can only be received if it is offered. McKinney, in presenting his case in chief, had every opportunity to introduce admissible evidence on this point, but did not do so. He clearly knew it was plaintiff's responsibility to present such evidence, since he had twice filed pretrial motions asking the U.S. Magistrate to appoint an expert for him to testify regarding the effects of secondary tobacco smoke, which she denied. . . .

(See Appendices E, F, G and H to Pet. App. in Case No. 91-269)

Respondent states, without supporting facts, that attempts to segregate smoking and non-smoking inmates, such as in the federal prison system, "[t]o the extent practicable" should significantly reduce complaints from non-smoking inmates. He cites examples of states which have specific policies to attempt to separate smoking and non-smoking inmates where possible. (See Opposition at pp. 6-7). Petitioners submit this is not likely to have much effect on the burgeoning inmate civil rights complaint industry. If exposure to undefined "unhealthful" levels of secondary tobacco smoke states a claim for cruel and unusual punishment, inmates who spend ten minutes in a cell with an inmate who smokes one cigarette will file a civil rights claim. Smoking inmates who must wait half an hour before they

can leave a non-smoking area will likewise file a civil rights claim.

It appears Respondent is arguing that because he has been housed at a different correctional facility, this case is not ripe for controversy. (See Opposition at p. 5). This argument is not well-taken for two reasons. State prisoners often are transferred from facility to facility, sometimes up to several times per year, and for a variety of reasons. McKinney is as likely to be transferred as any other inmate. Second, the possibility that McKinney will be housed with a smoker or otherwise exposed to secondary tobacco smoke is as likely at the Ely State Prison as it is at the Nevada State Prison. The problems faced by prison administrators in classifying and housing inmates are similar, regardless of in which facility an inmate is presently confined.

REASONS FOR GRANTING THE WRIT

Respondent disputes Petitioners' argument that permitting the Ninth Circuit's decision to stand will not have a significant effect upon the cost of maintaining prisons, will not encourage new litigation, and will not adversely affect prison management. (See Opposition at p. 6). Petitioners submit this ignores the realities of managing prison systems. Prisons house inmates who are among the most violent, deceitful, unstable and manipulative individuals in our society. Smoking and non-smoking inmates alike are well-known for attempting to manipulate cell assignments through various methods, including claiming non-smoking status. Prison administrators must balance the relative risks of all cell assignments, within the limitations of available facilities. For example, is there a potentially greater risk of harm by housing a

black non-smoker with a non-smoking AIDS patient, or with a non-smoking white supremacist, or with a smoker who appears otherwise compatible.

Petitioner submits Respondent's speculation that complaints from non-smoking prisoners will be reduced by segregating smoking and non-smoking prisoners is naive, and demonstrates a lack of understanding about the nature of the majority of inmate civil rights litigation. As soon as inmates perceive that a "right" exists, they will seek to test all potential parameters of that right through litigation. They will exploit and hamper prison administrators who are attempting to manage an already complicated classification process.

Respondent's attempt to distinguish the many cases which have addressed the problem of non-smoking inmates being housed with smoking inmates merely under-

scores the need for this Court to resolve the issue of whether an inmate's exposure to secondary tobacco smoke, at any particular level or for any particular length of time, in the absence of an existing medical problem, creates a cause of action under the Eighth Amendment.

Of the four circuit courts which have considered this issue in the past few years, only one, the Ninth Circuit, has decided that an inmate can state an Eighth Amendment claim by alleging, in the absence of related medical problems, exposure to unhealthy levels of secondary tobacco smoke. The other circuits disagree.

The Tenth Circuit in Clemmons v. Bohannon, 956 F.2d 1523, 1527-1528 (10th Cir. 1992) [Clemmons II] specifically stated the inmate's exposure to secondary tobacco smoke, though perhaps restrictive and harsh, was nonetheless "...of a less-

er magnitude than those cases that have found an Eight Amendment violation due to deliberate indifference to serious medical need."

Once again, Petitioner's reliance on the Ninth Circuit's statement that the U.S. Magistrate denied McKinney the chance to introduce any evidence on his secondary tobacco smoke claim is in error. It was McKinney's burden to produce competent, admissible evidence. The U.S. Magistrate declined to exercise her discretion to find and appoint expert witnesses to help him, but that did not preclude him from finding his own witnesses.

Respondent's reference to Franklin v. State of Oregon, 662 F.2d 1337 (9th Cir. 1981) is correct insofar as an inmate was permitted to proceed with his Eighth Amendment claim when housed with a cigarette smoker, however the inmate suffered . . .

from a medical condition, throat cancer, and the Court stated:

> If these conditions, however, were as threatening to Franklin's health as he alleged and if they were the result of deliberate indifference on the past of the prison officials, then Franklin arguably has alleged cruel and unusual punishment under the Eighth Amendment.

Franklin, at p. 1347.

Thus, at that time, the Ninth Circuit permitted an Eighth Amendment claim based on exposure to secondary tobacco smoke only where a medical condition existed. And certainly it was clear that deliberate indifference was required to be established by the plaintiff.

Although the primary issue in Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989) was on the res judicata issue, nonetheless, the Fifth Circuit made clear its opinion of the Eighth Amendment issue by quoting with approval from Gorman v. Moody, 710 F. Supp. 1256 (N.D. Ind. 1989), which held that where a plaintiff

did not allege a serious medical condition exacerbated by exposure to tobacco smoke, no Eighth Amendment claim is stated.

The Seventh Circuit, in Steading v. Thompson, 941 F.2d 498 (7th Cir. 1991) quite clearly stated its view that exposure to secondary tobacco smoke is common in society, and it was ludicrous to believe either restauranteurs or prison administrators intended to punish others with smoky air. Steading reaffirmed that where a serious medical condition is alleged, only then can an Eighth Amendment Claim be stated.

Respondent states that Nevada's law exempting correctional facilities from laws regulating smoking in public places has no effect on whether McKinney can proceed with an Eighth Amendment claim. (See Opposition at p. 10). Petitioners point out the exemption is illustrative

of the evolving standards of decency on this issue which Petitioners believe the Ninth Circuit should have taken into account in determining whether an inmate's exposure to secondary tobacco smoke constituted cruel and unusual punishment.

Respondent states it was proper for the Ninth Circuit to have treated McKinney's pro se appeal with deference, thus justifying the Circuit Court's decision to broaden the issues without giving the parties the opportunity to address them in their briefs. (See Opposition at p. 11). Petitioners respectfully point out that although pro se, McKinney was then, and continues to be, an experienced inmate litigator. An examination of the docket of the United States District Court for Nevada will reveal his name as a plaintiff in over thirty-five civil rights cases.

. . .

Respondent states no evidence was heard at trial on his claim about prison conditions because the U.S. Magistrate held that McKinney, as a matter of law, had failed to state a claim for relief. This ruling, however, was not made until after McKinney had presented his case in chief. (Pet. App. D). The U.S. Magistrate specifically noted that McKinney failed to present "...any medical proof or testimony that such exposure to cigarette smoke could even cause such [cold-like] symptoms." (Pet. App. D-9, D-10)

McKinney has had his day in court. He was given the opportunity to prove his case at the district court level, and he was unable to satisfy his burden of proof, resulting in a directed verdict for Petitioners. It would be an unfair burden and expense to retry this case now, and it would not resolve the issue of whether inmate exposure to secondary

tobacco smoke can state a valid Eighth Amendment claim.

Essentially, three other circuits are in conflict with the Ninth Circuit, which stands by its original decision despite this Court's remand following Wilson v. Seiter. In addition, numerous federal district courts have considered this issue and come to differing conclusions.

It is clear from the number of states and territories which have joined the brief amicus curiae that a resolution of this question is timely and compelling.

As pointed out by the amicus brief and in the petition, McKinney at trial failed to present credible evidence to satisfy either the subjective or objective components of an Eighth Amendment prison conditions claim. The Ninth Circuit erred in applying Wilson v. Seiter on remand from this Court.

. . .

Finally, this Court should resolve the constitutional question of whether, in the absence of serious medical problems, inmates' exposure to secondary tobacco smoke which may pose a health risk violates the right to be free from cruel and unusual punishment.

III.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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